No. 03-704

Supreme Court, U.S.
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In The

Supreme Court of the United States

KAWASAKI MOTORS CORP., U.S.A.,

Petitioner,

v.

BOB SCHULTZ MOTORS, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Eighth Circuit properly affirmed the district court's confirmation of an arbitration award under the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.*, where the arbitrator did not exceed his authority, did not rule on any issues that were not submitted to him, and the arbitrator's final award was neither irrational nor evidenced a manifest disregard for the law.

CORPORATE DISCLOSURE STATEMENT

The respondent is Bob Schultz Motors, Inc., a Missouri corporation that has no parent corporation. Its stock is not publicly traded, and no publicly traded company owns ten percent or more of its stock.

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JURISDICTIONAL STATEMENT

The respondent agrees with the petitioner that jurisdiction in this Court could be founded on 28 U.S.C. § 1254 if the appropriate facts and circumstances were present. This case, however, presents none of the compelling circumstances that could warrant a writ of certiorari as required by this Court's Rule 10. Therefore, the Court should exercise its discretion to deny the relief requested by the petitioner.

STATEMENT OF THE CASE

Kawasaki Motors Corp., U.S.A., continues to seek relief from the district court's Judgment Confirming Arbitration Award. The district court submitted the claims of Bob Schultz Motors, Inc., to arbitration on Kawasaki's strenuous insistence that the dealership agreements between Kawasaki and Schultz required arbitration of those claims. The district court granted Kawasaki all the relief it sought in connection with the request to compel arbitration, and Kawasaki has never appealed from that ruling.

The arbitration proceeding was bifurcated into a liability portion and a damages portion. The arbitrator found the liability issues in Kawasaki's favor. Kawasaki then presented to the arbitrator a request for an award of costs and expenses, including attorney fees. The parties submitted memoranda on the issue, and the arbitrator conducted a two-day hearing at which he received extensive evidence. Both parties fully participated in this hearing and submitted the issues to the arbitrator. After hearing the evidence, the arbitrator issued his Final

Award of Arbitrator, in which he found that the clause in the parties' arbitration agreement providing for the "prevailing party" to obtain all costs and expenses was unconscionable and unenforceable.

Kawasaki moved the district court to confirm the portion of the arbitration award favorable to Kawasaki and vacate the unfavorable portion. The basis of Kawasaki's motion to confirm and vacate was that the arbitrator purportedly exceeded his authority in deciding issues that the district court had not submitted to him, and in disregarding or misinterpreting the district court's prior ruling on the arbitrable issues. The district court denied Kawasaki's motion, holding that the arbitrator correctly interpreted the court's prior ruling and did not disregard any directives by the court; that the arbitrator arbitrated the issues submitted to him; and that the arbitrator therefore did not exceed his authority.

In the apparent belief that the district court was less knowledgeable than Kawasaki about the meaning and effect of the court's own prior rulings, Kawasaki appealed to the Eighth Circuit, which affirmed.

A. The dispute between the parties

This case has its genesis in Kawasaki's breach of the Dealer Sales and Service Agreements ("dealership agreements") between the parties. In February of 1993, Schultz filed a petition against Kawasaki in the Circuit Court of St. Louis County, Missouri, alleging breach of contract, tortious interference with a contractual relationship, breach of third-party beneficiary contract, and violation of the Missouri Motor Vehicle Franchise Practices Act, and seeking declaratory relief. Schultz's lawsuit arose from

Kawasaki's improper refusal, in 1992, to permit Schultz to purchase a third franchise or to relocate its franchises.

B. The arbitration provision

Paragraph 32 of the dealership agreements contained an arbitration provision. In Count V of its petition, Schultz's claim for declaratory relief, Schultz alleged that the arbitration provision was unenforceable in its entirety because it was embodied in a contract of adhesion and because it violated the public policy of Missouri as expressed in Missouri's Motor Vehicle Franchise Practices Act, Mo. Rev. Stat. § 407.820 (2000).

Kawasaki removed the case to the United States District Court for the Eastern District of Missouri based on the district court's diversity jurisdiction. Shortly thereafter, Kawasaki filed its Motion to Dismiss or for Other Relief. The "other relief" Kawasaki sought was that any issues that survived the dismissal motion be referred to arbitration in Los Angeles, California, pursuant to the arbitration provision in paragraph 32 of the dealership agreements.

The arbitration clause in the dealership agreement contained the following language:

> 32. DISPUTE RESOLUTION
>
> All controversies, claims and disputes arising in connection with this Agreement, except any controversies, claims and disputes relating to amounts due and unpaid to DISTRIBUTOR, relating to DISTRIBUTOR'S rights to retake possession of any Product or relating to third party personal injury, shall be settled by mutual consultation between

> the parties in good faith as promptly as possible, but failing an amicable settlement shall be settled finally by arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association, and the parties hereto agree that such arbitration shall be the sole and exclusive method of resolving any and all such controversies, claims or disputes, except those expressly excluded above. Judgment upon such award may be entered in the Superior Court of the State of California for the County of Orange, if the award is rendered against DISTRIBUTOR, or in any court which has jurisdiction over DEALER, if the award is rendered against DEALER. The prevailing party shall be entitled to recover from the nonprevailing party all costs and expenses of the arbitration, including without limitation, attorneys' fees.

In its motion to dismiss, Kawasaki did not address the costs and fees provision in the last sentence of the arbitration clause.

C. The order compelling arbitration

The district court ruled on Kawasaki's motion on March 30, 1994. At the outset of the court's memorandum and order, the court recognized that, in deciding whether to submit a grievance to arbitration, it could not "rule on the potential merits of the underlying claims." The court stated that "the merits of the dispute and whether the failure to meet any prerequisites will bar recovery are for the arbitrator to decide."

The court *sua sponte* converted Kawasaki's motion to dismiss Schultz's claim for declaratory relief into a motion to compel arbitration. The court dismissed some of Schultz's claims and, after determining that the contract language reflected the parties' intent that "most disputes between the parties will be arbitrated, with certain exceptions not applicable here," the court referred all remaining claims to arbitration.

In its memorandum and order, the district court made several findings with respect to the parties' agreement to arbitrate. The court found that the agreement to arbitrate was not unenforceable as a provision in a contract of adhesion, citing Eighth Circuit case law stating that "the use of a standard form contract between two parties of admittedly unequal bargaining power does not invalidate an otherwise valid contractual provision." The court determined that there was nothing inherently unfair or unconscionable about the agreement to arbitrate. The court further found that there was sufficient mutuality of obligation with respect to the agreement to arbitrate, because the "parties agreed to arbitrate most claims either might have arising under the franchise agreements."

The district court also explicitly noted that discovery had not yet occurred in the case. In its memorandum and order, the court did not suggest that its ruling would preclude the arbitrator from determining the enforceability of any portion of the arbitration agreement after discovery had been conducted and evidence on that issue had been considered.

D. The court's additional instructions to the arbitrator

In accordance with the court's order, Schultz filed its demand for arbitration. On December 12, 1994, the American Arbitration Association appointed the Honorable Richard P. Byrne (a former California Superior Court judge) as arbitrator.

On February 3, 1995, Schultz filed an Amended Demand for Arbitration, in eight counts. Some of those counts restated claims – with additional factual assertions – that the district court had already dismissed or referred to arbitration, and some counts were new claims arising from a 1994 transaction between Kawasaki and Schultz. The arbitrator, reluctant to proceed with the arbitration without clarification from the district court as to what counts should be arbitrated, stayed the proceedings and referred the matter back to the district court to make whatever orders the court deemed appropriate to identify and clarify the issues to be considered in the arbitration proceedings.

The district court ruled on the arbitrator's request on August 7, 1995. The court held that the arbitrator should not hear Schultz's restated claims, for the same reasons those claims had been dismissed in the court's earlier memorandum and order. The court held that Schultz's new claims should be considered by the arbitrator.

E. The arbitration

The arbitration took place in Los Angeles, California, in March and April, 2000, and lasted three weeks. The issues of liability and damages were bifurcated. The arbitrator provided the parties with a Ruling on Liability

Issues on May 4, 2000. The arbitrator determined that Kawasaki was not liable to Schultz for damages. The arbitrator further stated that Kawasaki was the "prevailing party" and, in accordance with paragraph 32 of the dealership agreements, was entitled to recover the costs and expenses of the arbitration, including attorneys' fees. In making that statement, the arbitrator relied solely on the language of paragraph 32 of the dealership agreements; the arbitrator had not yet considered any defenses Schultz might raise to the enforceability of the fee provision. The arbitrator granted each party time to submit a memorandum on costs and expenses, and the right to request a hearing on these issues.

The hearing on costs and expenses was held in St. Louis, Missouri, on January 16 and 17, 2001. Kawasaki sought $1,760,438.63 in costs and expenses, including attorneys' fees.[1] Schultz opposed Kawasaki's request. At the hearing, both parties presented evidence and arguments.

After hearing "the allegations and proofs of the parties concerning [Kawasaki's] claim for costs and expenses," the arbitrator issued his Final Award of Arbitrator. The Final Award incorporated the arbitrator's prior Ruling on Liability Issues. In the Final Award, the arbitrator determined that the fee provision was unconscionable, and therefore unenforceable. The arbitrator's decision was

[1] At the hearing, Kawasaki reduced its requested amount of costs and expenses to $1,725,923.63. Several days after the hearing, Kawasaki increased the requested amount to $1,772,815.23, and submitted additional documentation purportedly supporting that request.

based on California law, in accordance with the choice-of-law provisions of the dealership agreements.

The arbitrator's decision was also based on the following evidence showing that Kawasaki pressured William Wefel, the president and sole shareholder of Schultz, into signing the dealership agreements containing the arbitration clause, and that Kawasaki wrote the agreements so as to make it extremely difficult and expensive for franchisees to pursue claims against Kawasaki.

The evidence showed that Mr. Wefel acquired a Kawasaki dealership from Bob Schultz in 1975, and a second dealership in 1981. For each dealership, Mr. Wefel signed standardized, identical agreements that did not contain arbitration clauses. The agreements were renewed annually. In 1987, Kawasaki presented Schultz and other franchisees with new three-year agreements, drafted by Kawasaki. The new agreements contained arbitration clauses. Mr. Wefel did not want the arbitration clause. The agreements were, however, non-negotiable. At the arbitration, Kawasaki did not dispute that, when it presented Schultz with the new contract, Kawasaki told Mr. Wefel that he had to sign the agreement or lose the dealerships. At the time Mr. Wefel was presented with this option, his investment in his dealerships comprised several hundred thousand dollars, and "more than a decade of time and effort in selling Kawasaki products" and developing his two locations into successful businesses. Mr. Wefel was presented with the same option of signing the agreements or losing his dealerships in 1990, when the renewed agreements – the agreements at issue here – were presented to him. Mr. Wefel felt he had no choice but to sign the agreements.

Testimony from Kawasaki's former Director of National Sales, Donald Pruitt, established that it was Kawasaki's official policy not to negotiate terms of its agreements with its dealers. Mr. Pruitt testified that he was not aware of any Kawasaki dealer other than Schultz that had brought a claim against Kawasaki. He testified that more than ninety-five percent of Kawasaki's dealers lacked the finances to proceed with a claim because of Kawasaki's ability to impose arbitration and make the procedure prohibitively expensive. In contrast, the evidence showed that Kawasaki could "well afford to pursue claims brought by franchisees with great vigor." In addition, the arbitrator found that the arbitration agreement lacked mutuality because Kawasaki, but not dealers, had the right to pursue certain claims in court.

The arbitration agreement required that arbitration take place in Los Angeles, "even though there [was] no reasonable justification or legitimate commercial purpose to be served by holding it there." The arbitrator found that "it appears that this requirement serves no purpose other than to make it more difficult and expensive for the franchisee to prosecute his claim." In this case, for example, counsel for both Schultz and Kawasaki were located in St. Louis, as were most of the witnesses. The arbitrator volunteered to hear the arbitration in St. Louis. Nevertheless, Kawasaki successfully resisted Schultz's efforts to have the arbitration conducted in St. Louis. Consequently, considerable costs and expenses were incurred that would have been unnecessary had the case been heard in St. Louis.

Finally, the Agreements permitted the prevailing party to recover *all*, not just reasonable, costs and expenses. The arbitrator noted that, under California law,

the prevailing party in a court proceeding would not be permitted to recover much of the cost and expense Kawasaki claimed in this arbitration.

Based on the evidence and the applicable law, the arbitrator ruled that each party would bear its own costs and expenses, and that Kawasaki and Schultz would equally bear the expenses of the American Arbitration Association and the arbitrator. The arbitrator made his ruling "in the exercise of his discretion under the applicable rules of the American Arbitration Association."

F. The confirmation of the award

Kawasaki subsequently filed in the district court a Motion to Confirm the Arbitration Award as to Liability and to Vacate and/or Modify the Arbitration Award as it Pertains to Attorneys' Fees, Costs and Litigation Expenses. Kawasaki argued that the arbitrator's decision denying Kawasaki its fees and expenses "must be vacated" on the theory that the district court had decided in its prior order that the fee provision was not unconscionable and was enforceable. Kawasaki argued that the court had not submitted the enforceability of the fee provision to arbitration. Kawasaki also argued that the arbitrator exceeded his authority by disregarding the district court's prior decision on the legal issues.

The district court denied Kawasaki's motion and entered its Judgment Confirming Arbitration Award on March 26, 2002. App. 177. The court concluded that "the arbitration award should be confirmed in its entirety," reasoning that the arbitrator had properly decided the issues submitted to him:

> [T]he arbitrator did not exceed his powers or award on a matter not submitted to him. The arbitrator correctly interpreted this Court's order of March 30, 1994, as addressing only the issue of arbitrability, *i.e.*, whether the arbitration provision between the parties should be enforced to require their dispute to be arbitrated. The Court did not address the attorney's fee provision, which was not mentioned in any of the parties' pleadings at the time.
>
> Given the arbitrator's power to interpret the Franchise Agreement, to find facts, to interpret and apply the law, and to make mistakes in so doing, the Court finds the arbitrator neither exceeded his powers nor awarded on a matter not submitted to him in determining that the attorney's fees portion of the arbitration provision was unconscionable under California law.

Kawasaki appealed the judgment confirming the award to the Eighth Circuit, which affirmed.

ARGUMENT

Because the district court could not, under the Federal Arbitration Act, partially vacate the Final Award of Arbitrator, the district court properly denied Kawasaki's Motion to Confirm the Arbitration Award as to Liability and to Vacate and/or Modify the Arbitration Award as it Pertains to Attorneys' Fees, Costs and Litigation Expenses. The Eighth Circuit properly affirmed the district court's judgment.

This case simply does not present the issues that Kawasaki suggests warrant certiorari. This is a case in which Kawasaki appealed from a judgment confirming an award. The cases in which Kawasaki purports to discern a conflict among the circuits are appeals from orders either granting or denying motions to compel arbitration. Kawasaki's cited cases relate to the standards employed when considering whether to compel arbitration, not whether to confirm the resulting award. Kawasaki never raised any issue about the order compelling arbitration in this case, and it never raised any objection about the proceedings or issues in the arbitration until after it was concluded. This case presents none of the issues that Kawasaki sets forth for this Court's review.

Kawasaki's arguments before this Court are remarkable – and flatly contradicted by the record and the governing law – given the history of this case. From the moment Kawasaki removed Schultz's case to federal court, Kawasaki insisted that all disputes arising out of the parties' dealership agreements, including the enforceability of the arbitration clause, be submitted to arbitration in California. Kawasaki participated in all phases of the

arbitration, including the arbitration hearing on Kawasaki's request for costs, expenses, and attorney fees.

Only after Kawasaki insisted on the arbitration and participated in it, and after the arbitrator found the fee provision unconscionable, did Kawasaki argue to the district court that the enforceability of the fee provision was never really submitted to arbitration. Then, Kawasaki argued to the district court for the first time that the court had already decided that the provision was enforceable in its prior orders submitting the dispute to arbitration. Kawasaki was wrong. The district court properly rejected Kawasaki's argument, holding that it had not previously decided that issue, that the issues arising out of the agreement had been submitted to arbitration, and that the arbitrator had acted within his jurisdiction in deciding the issues submitted to him.

Despite the district court's determination, in the Eighth Circuit, Kawasaki clung to its argument that the enforceability of the fee provision was never submitted to arbitration. The Eighth Circuit correctly rejected this claim. Kawasaki also asserted the new theory that the district court could have partially vacated and partially confirmed the arbitrator's final award because that single "Final Award" was actually two separate, distinct awards. This contention was properly rejected as well.

The undisputed facts show that the district court and the parties submitted the issue of the enforceability of the fee provision to arbitration. Kawasaki participated in the arbitration hearing on that issue. The arbitrator did not exceed his authority or award on an issue not submitted to him. Under the Federal Arbitration Act, Kawasaki could not obtain a judgment selectively confirming the favorable

portions of the arbitrator's award, and vacating the unfavorable portions. The district court properly denied Kawasaki's motion for such relief, and confirmed the arbitration award in its entirety. The petition for a writ of certiorari should be denied.

I. Kawasaki's asserted conflict among the circuits is not relevant to this case.

Kawasaki claims to be the victim of its own success. In the district court, Kawasaki vigorously insisted that all disputes between the parties must be submitted to arbitration. The district court agreed and referred the case to arbitration. Nothing prevented Kawasaki from refusing to submit the fee issue to the arbitrator. However, both parties submitted memoranda on the issue, and the arbitrator conducted a two-day hearing at which he received extensive evidence from both parties. Both parties fully participated in this hearing and submitted the issues to the arbitrator. Kawasaki should not now be heard to claim that the arbitrator improperly determined the fee issue.

Under these undisputed facts, the cases cited by Kawasaki are irrelevant to the issues in this case. The cases that are said to be in conflict ***all*** involve the issue of whether a district court properly submitted a matter to arbitration. *Investment Partners, L.P. v. Glamour Shots Licensing, Inc.*, 298 F.3d 314 (5th Cir. 2002) (appeal from order on motion to compel arbitration); *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646 (6th Cir. 2003) (same); *Alexander v. Anthony Int'l, L.P.*, 341 F.3d 256 (3d Cir. 2003) (same); *Snowden v. CheckPoint Check Cashing*, 290 F.3d 631 (4th Cir. 2002) (same); *Hadnot v. Bay, Ltd.*, 344

F.3d 474 (5th Cir. 2003) (same); *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165 (9th Cir. 2003) (same); *Shankle v. B-G Maint. Mgmt.*, 163 F.3d 1230 (10th Cir. 1999) (same); *Spinetti v. Service Corp. Int'l*, 324 F.3d 212 (3d Cir. 2003) (same); *Burden v. Check into Cash of Kentucky, LLC*, 267 F.3d 483 (6th Cir. 2001) (same); *Anders v. Hometown Mortgage Serv., Inc.*, 346 F.3d 1024 (11th Cir. 2003) (same); *Paladino v. Avnet Computer Tech., Inc.*, 134 F.3d 1054 (11th Cir. 1998) (same); *Hawkins v. Aid Ass'n for Lutherans*, 338 F.3d 801 (7th Cir. 2003) (same).

In this case, Kawasaki has no right to complain about the issues submitted to the arbitrator. Its motion to compel arbitration was ***sustained***. It never appealed from the order compelling arbitration. Kawasaki was always supremely happy to present all aspects of the parties' dispute to the arbitrator – until the award was rendered. Only then did Kawasaki begin to assert that the arbitrator acted beyond his authority. The district court and the Eighth Circuit properly rejected this about face.

Kawasaki did not raise the issue that is the subject of its petition in the arbitration proceedings. It did not raise this issue in the district court. It never directly raised this issue in the Eighth Circuit. If there is a conflict in the circuits on the issue suggested by Kawasaki, this case does not present it.

II. Kawasaki consented to the arbitrator's determination of the fee issue.

It is notable that Kawasaki asserts that this Court should use this case as a vehicle to "clarify the extent to which a district court's ruling on arbitrability . . . constrains the arbitrator's powers." Kawasaki failed to give

the district court a chance to do just this when the arbitration was proceeding. At one point, when the arbitrator required guidance from the court as to the issues he was to decide, Schultz filed a motion for the court to provide instructions to the arbitrator, which the court provided. (The court's order appears at page A-25 of Kawasaki's appendix.) Nothing prevented Kawasaki from asking the district court to clarify whether the fee issue was properly before the arbitrator, yet Kawasaki did not ask for this relief. Kawasaki never asserted that there was any need for such clarification. Kawasaki never sought declaratory or injunctive relief from the district court before commencement of the arbitration or the bifurcated damages portion of the proceedings. It is wholly inappropriate for Kawasaki to seek such relief from this Court in the first instance.

If through nothing else, certainly through its conduct Kawasaki granted the arbitrator jurisdiction to determine the merits of the fee issue. After initiating and participating in the arbitration, Kawasaki cannot now "be heard to argue the arbitrator had no authority to decide the issues submitted." *Franklin Elec. Co. v. Int'l Union, UAW*, 886 F.2d 188, 191 (8th Cir. 1989). A party's consent to arbitrate an issue may be implied from its conduct. *Id.* Consent to arbitrate is manifested by "arguing before the arbitrator not only the merits of a dispute, but also the question of arbitrability without expressly reserving the arbitrability determination for judicial review." *Id.* Kawasaki did just that. It did not reserve for the district court the question of whether the enforceability of the fee provision was arbitrable. There is nothing in the record indicating that Kawasaki preserved the question for judicial determination in its motion to compel arbitration or during the

arbitration proceedings. In fact, the district court expressly found that the fee provision was not mentioned in anything Kawasaki filed in the district court prior to filing its motion to vacate or modify the arbitration award.

III. The district court did not err in confirming the award.

Kawasaki, unhappy with the arbitrator's Final Award, asked the district court for dual relief that the Federal Arbitration Act does not authorize: confirmation of only that portion of the award favorable to Kawasaki, and vacatur of the unfavorable portion. Under the FAA, the district court could (1) confirm the award under Section 9; (2) vacate the award under Section 10; or (3) modify the award under Section 11. These were the only avenues of relief available to Kawasaki unless Kawasaki proved that the award was "completely irrational" or evidenced a "manifest disregard for the law." *Kiernan v. Piper Jaffray Companies, Inc.*, 137 F.2d 588, 594 (8th Cir. 1998). Absent one of the circumstances set forth in Section 11, the district court had no power to selectively modify the award by vacating only the portion unfavorable to Kawasaki. *UHC Management Co., Inc. v. Computer Sciences Corp.*, 148 F.3d 992, 999 (8th Cir. 1998) ("On a motion for confirmation, we have no power to selectively modify the award to delete such an order from the panel's decision unless one of the circumstances detailed in section 11 of the FAA applies"). The district court also had no power to vacate in part and confirm in part the arbitrator's award under Section 10. *Legion Ins. Co. v. VCW, Inc.*, 198 F.3d 718, 721 (8th Cir. 1999) ("the district court must take the award as it finds it and either vacate the entire award using section 10 or modify the award using section 11.")

Confronted with the settled law that bars it from cherry-picking the favorable portions of the arbitration award, Kawasaki attempted to argue on appeal that the arbitrator really issued *two* awards – a "First Award" and a "Second Award." Kawasaki sought to have the "First Award" confirmed and the "Second Award" vacated. In continuing to maintain this fiction, Kawasaki exhibits a remarkable talent for disregarding the record and its own arguments to the district court.

Before this appeal, Kawasaki harbored no illusions that the arbitrator issued two separate awards. Kawasaki filed in the district court a "Motion to Confirm the Arbitration Award as to Liability and to Vacate and/or Modify the Arbitration Award as it Pertains to Attorneys' Fees, Costs and Litigation Expenses." The very title of its motion reflected Kawasaki's request for modification or partial vacation of *the* single arbitration ***award***. The motion went on to request the court to "vacate and/or modify the ***portion of the arbitration award*** as it pertains to attorneys' fees, costs and litigation expenses." As Kawasaki conceded in the district court, the arbitrator issued only one award. The district court and the Eighth Circuit did not err in confirming this single award.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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